

# The state is dead – long live the state!

## Statehood in an age of catastrophe

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The geographical impact of climate change on statehood is rather clear. Ever since scientists have been warning about climate change and the rise in sea levels it would involve, several small island nations have been at the center of a discussion involving *in situ* adaptation, possible cross-border migration, and statehood. Indeed, the future of states such as Tuvalu, Kiribati or the Maldives poses a challenge to the traditional concept of state in that to maintain their existence as states, the formal need for a territory and population might need to be relaxed, if this is possible at all. This new problem has generated an [active scholarly discussion](#), bolstered by the unprecedented nature of such a situation.

From that discussion has emerged the idea of stretching traditional statehood to include a new type of [de-territorialized states](#), whose existence would not rely on the traditional requirements of statehood. However, the existence of a state beyond its physical roots (at least as they are usually conceived) poses a number of challenges to the monolithic conception of the state. Such a de-territorialized state's prerogatives would be limited in practice, and it is uncertain how it would function. However, were this option to become reality, an *ex situ* state would effectively become a type of hybrid, somewhere between a non-state actor and a sovereign state. While perhaps seemingly novel, there are some examples of such entities inhabiting the grey zone between statehood and non-state actor, the most cited being the [Sovereign Military Order of Malta](#). A relic of the times of yore, the Order of Malta enjoys some of the prerogatives usually reserved for states such as diplomatic immunity or the [ability to maintain diplomatic ties with most members of the international community](#). Crucially however, the Order of Malta does not claim to be a fully-fledged state, thus avoiding the intense scrutiny that comes with statehood.

How would an entity permeable to some of the same criticism addressed to non-state actors, concerning legitimacy or accountability for instance, face that criticism? This would be particularly interesting to consider, taking into account that such a de-territorialized state would most likely retain its membership in most major international law-making forums, including the United Nations. Arguably, even though its role would be primarily advocacy on behalf of its citizens, a de-territorialized state could still enjoy the “general” legal personality enjoyed by states. Effectively, if the attempts of a small island state to maintain its continued statehood beyond physical disappearance succeed, it would blur the outer limits of statehood. Thus, if even the requirements to act as a traditional gatekeeper of international action are loosened, could non-state actors take advantage and argue their way to statehood, the holy grail of international legal personality?

While climate catastrophe questions our conceptions of the role of territory for statehood, and its relationship to a population, the debate on states as subjects of

international law takes another twist when approached from a 'systemic perspective'. Crises often produce turning points in governance and law. Climate change is no exception in this respect, as the complexity of the problem has made international environmental law adopt flexible and informal shapes. This is not a feature only of environmental law, but taps into a broader discussion of the stagnation of formal international law, with a corresponding pluralization and increase in [informal international lawmaking](#). Formal standard-setting processes are not seen to allow for the necessary width of participation in [complex problem solving](#), nor for smooth adjustment in light of changing circumstances, leaving formally binding law the role rather of "[orchestrating](#)" rather than "regulating" international action. It is probably safe to say that regulatory pluralism is particularly tangible in international environmental law.

The [2009 UN Climate Conference](#) is often [mentioned as a turning point](#) for global climate politics towards a decentralized climate policy architecture. Ever since, climate change governance has been characterized by [experiments](#). These experiments have been of some importance for the role of states. Along with the rise of '[private spheres of authority](#)', also new paradigms of representation and decision-making have emerged. Even in bodies of more traditional design, the role of state consent in decision-making may, even at best, only be implicit, whereas the [outcomes can be tangible](#). All of this adds up to an erosion of the competence and authority of states in climate governance. Whereas in [1949 the ICJ founded](#) the autonomy of international organizations on the consent of states, these more recent developments suggest that states may not be needed for organizations to enjoy institutional autonomy after all. If there ever was any intrinsic constraint against the recognition of entities other than states or intergovernmental organizations as subjects of international law, [some authors](#) claim that at least now the very conception of what it means to be a subject of international law, can and should be revised. And if the authority to create entities and confer powers upon them is no longer the sole prerogative of the state, then the role of statehood as a permission to act as gatekeeper of international action disappears.

There is some irony in the fact that it is at times of catastrophe when states are needed the most. We can witness this in the outbreak of the Covid-19 pandemic during spring 2020, as borders were closed in order to protect the health of the population. States may also be the only actors capable of challenging some features of climate action experiments such as '[liberal environmentalism](#)'. There is even more irony in the fact that while climate change creates a need for opening statehood for actors that do not fulfil all the criteria of the [Montevideo Convention](#), the very institutional system for dealing with climate change works to water down that statehood from what it once meant.

We have all been recently reminded of the crucial protective function that states perform. Also the discussion on redefining the contours of statehood has emerged from the need to ensure effective performance of that function. But whereas dealing with the pandemic has highlighted the importance of international cooperation (in order to perform the protective function), effective climate governance seems to require an erosion of statehood. Statehood is at a crossroads, and it is not clear if

catastrophes will bring further dilution, or if the turmoil will result in states attempting to regain control of international law-making. Trump's aggressive [undermining of the WHO](#) could set a dangerous precedent, even now that the case for increased coordination has never been so apparent.

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*This blogpost summarizes ideas and insights we gained while co-teaching the course "Rethinking Actors of International Law" for master's students in public international law at [Åbo Akademi University](#) over the past two years.*

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